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TAKING COMMERCIAL LAW SERIOUSLY: FROM JURISPRUDENCE TO PEDAGOGY

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I. CODE JURISPRUDENCE

The Uniform Commercial Code (the "Code") is the singular expression of a jurisprudential vision. As the conventional wisdom suggests, American Legal Realism was both a reaction to Legal Formalism¹ as well as a striking vision of the role of law in modern society. The Code was, of course, fashioned in the image of one of its principal architects, Karl N. Llewellyn. No jurisprudence of the Code is possible without some account of Llewellyn's jurisprudence and the "realism" he fostered in his great legislative achievement.²

Formalism, at least Langdellian formalism, was a vision of law in the manner of early modernist science. Like the natural scientists he so admired, Langdell wanted to uncover the logic of law, a logic that he believed was hidden beneath the play of judicial decision-making. As he famously said,

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all those that have been reported.

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1. I discuss formalism in Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995).

2. For a discussion of Llewellyn's jurisprudence and the special context of Merchant Rules in the Code, see Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.³

To be sure, Llewellyn's realism was a rejection of Langdellian formalism. But it is important to appreciate that, like Langdell, Llewellyn did not reject the idea that law could be found. Rather, Llewellyn thought that the law Langdell found hidden was already in plain view.⁴

Unlike Langdell, who believed that the state of the law could be divined from underlying principles, Llewellyn rejected the idea that rules or principles were the best source for divining the law of a transaction. For this, one must turn to commercial practices.

There is no better confirmation of this characterization than the text of the Code itself. Consider the definition of Agreement:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103).⁵

When asking whether the parties have an Agreement, and what the content of that Agreement might be, one looks not to legal norms but to what the Code refers to (without definition) as "the bargain of the parties in fact." The task of a judge is not to look at the facts and couple those with norms to reach a legal conclusion. Rather, the judge is to look at the facts *as they would be viewed by a similarly-situated merchant* and, on that basis, draw a conclusion.

This Realist vision of law is profoundly different from formalism and, yet, strangely similar. The Realist—in this case, Llewellyn—is

3. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi-vii (Boston, Little, Brown, & Co. 1871).

4. Llewellyn's view is criticized in Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 624 (1975) (noting that, for Llewellyn, "an 'immanent law' lay embedded in any situation and the task of the law authority was to discover it").

5. U.C.C. § 1-201(3) (1989).

not denying that "law" has a source,⁶ rather, he is just locating the source in a different place.

II. THE CODE AS A SOURCE OF LAW

Defined in terms of sources, commercial law is composed almost exclusively by the Uniform Commercial Code and the common law of contracts.⁷ Among statutes, the Code is unique for a variety of reasons, not the least of which is the fact that it is the earliest, if not the purest, expression of a jurisprudence.⁸ Owing both to the passage of time, and current redrafting efforts, the jurisprudential dimension of the Code has narrowed in both its scope and importance. These developments do not in any way diminish the centrality of the Code for questions of commercial law: the Code is the principal text for resolving questions of commercial law.

As a statute, and as a jurisprudential artifact, the Code has been the subject of extensive commentary and analysis. Like other areas of private law, the Code has been a favorite object of scrutiny from a diverse range of perspectives, from economics to critical theory. Whatever the merits of these analyses may be, scant attention has been paid to the question how best to teach the subject.⁹

Having written about and taught the Code for a decade, I welcome the opportunity to express my opinion on what it means to take commercial law seriously. I propose to make my comments in a very specific context, that of pedagogy.

I have just completed a casebook in commercial law.¹⁰ This multi-year project was an occasion for me to think through what commercial law is all about and, more importantly, how to teach the subject. I have learned much in the process of this unique and quite demanding project. To share what I have learned, I want to describe what Richard Hyland and I are trying to do with this book and why we think taking commercial law seriously requires rethinking what it means to teach the subject.

6. Thus, we may conclude that both Formalism and Realism are, in some sense, positivistic.

7. For the most recent general statement of the rules of contract law, see *RESTATEMENT (SECOND) OF CONTRACTS* (1981).

8. For discussion of the jurisprudential dimensions of the Code, see Danzig, *supra* note 4.

9. But there have been some interesting commentaries. See, e.g., Douglas Laycock, *A Case Study in Pedagogical Neglect*, 92 *YALE L.J.* 188 (1982) (reviewing RICHARD E. SPEIDEL ET AL., *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* (3d ed. 1981)).

10. RICHARD HYLAND & DENNIS PATTERSON, *INTRODUCTION TO COMMERCIAL LAW* (1999).

III. COMMERCIAL LAW TODAY

One avenue to understanding any subject is to look at how knowledge of the subject is transferred from one generation to the next. Considering the law school curriculum, one sees a variety of approaches, even within a given field. These differences in perspective or orientation are manifested in the variety of approaches to a given subject-matter. This reflects both a healthy diversity of pedagogical opinion as well as different approaches to theorizing a field.

When one looks at the commercial law curriculum, it is astonishing to see that, unlike any other subject in the law school curriculum, commercial law is taught along two parallel but non-communicating tracks. First, there is the survey course devoted to a basic overview of the subject matter. Typically taught for four credits, this course proceeds in turn through each of the Articles—the major subject-matter divisions—of the Code. The course is designed principally for students who wish some familiarity with the Code (especially in those jurisdictions in which commercial law is tested on the bar exam) but who have decided that they do not wish to pursue a career in the commercial field.

These courses, and the casebooks designed for them, are meant to be neither sophisticated nor demanding. Time limitations prevent in-depth examination of the complicated interrelationships among Code provisions. Cases are chosen with one criterion in mind: they stand squarely for principles or rules contained in the Code. Like the cases, problems in these texts tend to be relatively easy to resolve.

Set against this introductory track is a second, parallel track. This track consists of a series of advanced courses, taught for two, three, or four credits, generally in three areas—sales, negotiable instruments and bank collections, and secured transactions. The books in these fields are deeply probing and demanding. Those who teach from these books are rarely able to teach all of the material they contain in the time allotted. These courses are often taken by students who wish to practice in the field of private transactions and who are therefore motivated to examine in depth the issues presented by the material.

Commercial law teaching is at a crossroads because the relationship between these two tracks is entirely unresolved. A number of solutions are currently possible, though unattractive. In some schools, students take either the basic course or one or more of the advanced courses, but not both. The disadvantages of this solution

are several. First, students are asked to decide at an early date in their legal education whether they wish to be commercial specialists or outsiders in the field. Second, there is no introductory course on the advanced track. In those schools in which the advanced courses may be taken without prerequisite, the courses are taught with at least one eye to the beginner, and the courses are unable to fulfill their promise of producing lawyers with a deep knowledge of the field. That is one of the reasons it is so difficult to teach all the way through the advanced casebooks. If, however, the courses are designated in sequence, commercial paper almost always comes at the end, and students will typically have to take ten credits of commercial law in order to learn about the law relating to their checking accounts.

This parallel structure is unsatisfactory and in need of replacement. In our casebook, we propose a uniform introductory course to commercial law. The course would be taken both by those who wish to become criminal prosecutors and those who plan to practice commercial law. The introductory course we envision would be a rigorous introduction to the conceptual problems raised by the practice of commercial transactions, both for the deal-maker and the litigator. It would examine all of the basic substantive areas of the Code, but not with the goal of providing an overview or preparing students for the bar exam. Instead, it would explore problems and cases in some depth and would attempt to communicate the fascination that commercial problems can elicit.¹¹

IV. METHODOLOGY

As is true in every intellectual and professional field, methodology is central. The methodology of the law school casebook has undergone some evolution since Langdell, but its basic form and structure are significant elements in the American legal tradition. Our casebook will be familiar and congenial to those who appreciate the traditional law school casebook. It contains cases, problems, and brief texts that provide orientation to the issues, large and small, that are covered by the material. The innovations we employ occur principally in five areas.

11. One of our theoretical contentions is that it is a pedagogical mistake to believe that imparting rules is the most important task of commercial law teaching. Rather, we believe that thorough understanding of the Institutions of the Code is the most important goal in commercial law teaching.

A. Emphasizing Independence of Thought

Perhaps the greatest flaw in the overview casebooks, as they currently exist, is that they rely on the cases for only one purpose, and that is to state the rules in the field. This use of the cases actually hinders students in their effort to develop their independent reasoning ability.

We use cases in two quite different ways. To begin with, the commercial cases often present an invaluable statement of the context of the legal questions posed by the dispute. Today, students tend to rush through that statement in order to get to the holding, the rule that will be the subject of class discussion. We, instead, take advantage of the facts to give students a feel for what life is like in the world of commerce. We try to explain whether the particular situation examined is typical or atypical. We also explain the relatively complicated relationships in such a way that they serve as a framework for a practical understanding of the issues involved. We ask whether either the parties or their lawyers might have done anything to avoid the problem that produced the legal dispute.

After aiding students to focus on the facts of the case, we encourage them to attempt to construct a legal solution—without first reading the legal analysis provided by the court. We ask them where they believe it would be appropriate to begin. Step by step they resolve the issues outstanding, moving from one Code provision to the next, and often to extra-Code material. In order to achieve this result, we innovate somewhat in terms of the presentation of the material and casebook design. More about this below.

After the students have reasoned their own way to a resolution, we turn to the court's opinion. We ask students to examine the opinion from the point of view of the answer they have already constructed. They easily recognize any errors, gaps, or inconsistencies in the court's reasoning. They are able to appreciate any exceptionally creative constructions which the judge has produced. Finally, with two or more possible solutions, we are able to ask the students to determine why the court reached the result that it did. We thus preserve both the possibility of critique and a respect for the wisdom of the common law judge.

B. Understanding of Interconnectedness

One of the unique features of commercial transactions is that

they frequently involve more than two parties and more than one area of the law. A typical sale and lease-back of a commercial airplane, for example, involves numerous parties and financing entities, as well as the law of sales, leases, secured transactions, negotiable instruments, and often letters of credit as well. Yet these areas are almost always, in the overview casebooks, treated separately. The interrelationship is rarely examined.

We teach commercial law on the basis of fact situations that permit us to explore these relationships. In other words, instead of attempting to teach through the Code from one Article to the next, we take advantage of the fact that the course is not limited in its commercial scope to a certain area. We examine all of the issues that arise in the particular commercial context. This contextual preparation gives students the foundation they require to appreciate the issues raised in the more specialized courses.

Another type of interrelationship is examined as well. In order to resolve many commercial issues, the Code often provides the reader with a round-trip ticket through its different Articles. These cross-references are usually ignored, because they point away from the issue that is the subject of immediate discussion. We instead emphasize these cross-references as a way of examining how the various Code provisions work together.

We also suggest to students that they consider the Code provisions from a more theoretically rigorous point of view. We ask them to compare the provisions that appear in a related form in different Articles. A good example is the notion of warranties, that appears in the Articles dealing with sales, leases, negotiable instruments, bank collections, letters of credit, documents of title, and investment securities. We want to know what these provisions have in common and how they differ. In the end, students know much more about warranty law than would be possible by an exclusive focus on the provisions of any one Article.

C. Relating to the Common Law

Commercial law teachers frequently remark that students seem to have insufficient preparation for the study of commercial law. The observation is accurate. There are several reasons for the problem. First, students have immediately behind them an intense experience in the common law courses, but much of that knowledge is not yet part of their active vocabularies. Second, many of the most important

common law questions are not discussed in the first year of law school or, for that matter, anywhere else in depth—particularly questions of restitution, equity, and agency.

Our holistic approach to commercial transactions is able to remedy this problem. When common law issues arise—such as assignments in the field of secured transactions, the parol evidence rule in the law of sales warranties, restitution in negotiable instruments law, property law concepts in the law of good faith purchase—we examine those issues with just as much care as we treat topics that are regulated in the Code. This provides students with an opportunity to solidify their knowledge of the common law subjects and, at the same time, to see them in their context. We especially discuss the differing remedial consequences of actions sounding in the various fields.

D. Creating a More Flexible Casebook Design

Traditionally, casebooks have presented alternating blocks of text, generally in the same typeface—cases, editorial commentary, problems. Our approach requires interruption of the flow of the court opinion, for example, in order to ask a question or make a comment. We also separate the statement of facts from the court's reasoning and conclusions.

One of the primary motivations for our approach is the belief that students cannot learn commercial law without constructing their own solutions to legal problems. To achieve this goal, we eschew the usual approach to commentary and question, that is, reserving these for presentation after the student has read the opinion. By intervening in the opinion with the student, we are confident we can bolster the ability to master the facts of a case and bring to bear a variety of possible legal solutions. In this way, we believe our approach is closer to the actual practice of commercial law than the traditional approach.

V. OUR GOAL FOR THE CASEBOOK

To sum up, this casebook turns the introductory course in commercial law into a significant contribution to a student's general legal education. Students will learn to work in a field in which case-oriented thinking and statutory interpretation are organically related. Students learn the basic vocabulary of commercial law. They will

discover how to disentangle and resolve the various elements in complex commercial transactions. They see how the Code fits into the framework of the common law. Our casebook is, and will appear to be, innovative, yet it will be comfortable to teach and to study. It contributes to a much-needed restructuring of the commercial law curriculum throughout the country and provide a model for rigorous, analytical, practice-oriented casebooks for the next decade.

CONCLUSION

I began by discussing the importance of the concept of Agreement in the overall structure of the Code. As I have said elsewhere,¹² this concept is central to a global understanding both of the Code and Llewellyn's aspirations for this quintessentially Realist legislative artifact. Notwithstanding the importance of Llewellyn's unique jurisprudential vision, more—much more—is required if one is to have a thorough grounding in the intricacies of the Code. In short, it is no easy task to move from the realm of jurisprudential vision to the concrete reality of the practicing commercial lawyer. Richard Hyland and I believe our casebook is true both to Llewellyn's unique vision of law and the needs of law students and their instructors in the late twentieth century.

12. See Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

APPENDIX

The following case comes from a chapter on Formalities.¹³ This chapter explores the Code's most important formal requirements, exhibited in contexts as varied as the Statute of Frauds in Article Two and the three necessary elements of a Security Agreement under section 9-203. In the opinion, our interventions are set off in italics. This case is representative of the book as a whole.

DF ACTIVITIES CORPORATION v. BROWN 851 F.2d 920 (7th Cir. 1988)

Before POSNER, COFFEY, and FLAUM, Circuit Judges.

POSNER, Circuit Judge.

This appeal in a diversity breach of contract case raises an interesting question concerning the statute of frauds, in the context of a dispute over a chair of more than ordinary value. The plaintiff, DF Activities Corporation (owner of the Domino's pizza chain), is controlled by a passionate enthusiast for the work of Frank Lloyd Wright. The defendant, Dorothy Brown, a resident of Lake Forest (a suburb of Chicago) lived for many years in a house designed by Frank Lloyd Wright—the Willits House—and became the owner of a chair that Wright had designed, the Willits Chair. This is a stark, high-backed, uncomfortable-looking chair of distinguished design that DF wanted to add to its art collection. In September and October 1986, Sarah-Ann Briggs, DF's art director, negotiated with Dorothy Brown to buy the Willits Chair. DF contends—and Mrs. Brown denies—that she agreed in a phone conversation with Briggs on November 26 to sell the chair to DF for \$60,000, payable in two equal installments, the first due on December 31 and the second on March 26. On December 3 Briggs wrote Brown a letter confirming the agreement, followed shortly by a check for \$30,000. Two weeks later Brown returned the letter and the check with the following handwritten note at the bottom of the letter: "Since I did not hear from you until December

13. HYLAND & PATTERSON, *supra* note 10, at 148. The court's footnotes have been omitted from the case report.

and I spoke with you the middle of November, I have made other arrangements for the chair. It is no longer available for sale to you." Sometime later Brown sold the chair for \$198,000, precipitating this suit for the difference between the price at which the chair was sold and the contract price of \$60,000.

There is already so much to talk about in this amazing case.

First things first. Each time you encounter a case decided under the Code, find the precise remedies provision that governs the action. The method of starting with the remedies provisions will save you an infinite amount of effort—and grief—later on. In general, if there is no provision in the Code that provides the remedy your client is seeking, the Code is irrelevant to your case. Moreover, the remedies provisions help you structure your investigation of the issues, since these provisions inform you of exactly what must be proved in order to succeed. By beginning with the remedies provisions, you will assure yourself that you discuss all the issues and can also be certain that nothing irrelevant creeps into your analysis.

Note that Posner does not find it necessary actually to refer to the relevant Code section. (That however does not provide an excuse for you!) The sales remedies are divided into remedies available to the seller, catalogued in § 2-703, and those available to the buyer, partially catalogued in § 2-711. The buyer wishes damages for the seller's failure to deliver the chair. We are in § 2-713. Note that the measure of damages for failure to deliver—the expectation damages—is the difference between the contract price (\$60,000) and the market price at the time the buyer learned of the breach, which may well be the \$198,000 that another buyer agreed to pay in an arm's length transaction. Since the third party seems to be a good faith purchaser for value, title has probably passed to the third party and specific performance is therefore unavailable—even though we are speaking of antique furniture.

Which brings us to the fairness issues here. The owner of Domino's Pizza is seeking to enforce a contract to purchase a chair worth \$198,000 for the price of \$60,000. If we assume for a moment that such a contract was actually entered into by both parties, curiosity requires us to ask how that might have happened. Did Sarah Ann Briggs of DF call Ms. Brown out of the blue and offer \$60,000 for the chair? Did she keep calling until Ms. Brown gave in? And did it then finally occur to Ms. Brown that she may be able to find someone who could appraise the chair for her?

If the sales price to DF is in fact less than one-third of the chair's market value, should the courts enforce this sale, even if there is a way to overcome the Statute of Frauds difficulties? What doctrine would you use on her behalf—mistake, unconscionability? Is there possibly some element of these

fairness considerations in the court's interpretation of the Statute of Frauds? If the facts were different, can you see the court producing a different ruling on the particular question at issue in this case?

Brown moved under Fed.R.Civ.P. 12(b)(6) to dismiss the suit as barred by the statute of frauds in the Uniform Commercial Code. See UCC § 2-201. (The Code is, of course, in force in Illinois, and the substantive issues in this case are, all agree, governed by Illinois law.) Attached to the motion was Brown's affidavit that she had never agreed to sell the chair to DF or its representative, Briggs. The affidavit also denied any recollection of a conversation with Briggs on November 26, and was accompanied by both a letter from Brown to Briggs dated September 20 withdrawing an offer to sell the chair and a letter from Briggs to Brown dated October 29 withdrawing DF's offer to buy the chair.

The district judge granted the motion to dismiss and dismissed the suit. DF appeals, contending that although a contract for a sale of goods at a price of \$500 or more is subject to the statute of frauds, the (alleged) oral contract made on November 26 may be within the statutory exception for cases where "the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made." UCC § 2-201(3)(b). DF does not argue that Brown's handwritten note at the bottom of Briggs' letter is sufficient acknowledgment of a contract to bring the case within the exemption in section 2-201(1).

At first glance DF's case may seem quite hopeless. Far from admitting in her pleading, testimony, or otherwise in court that a contract for sale was made, Mrs. Brown denied under oath that a contract had been made. DF argues, however, that if it could depose her, maybe she would admit in her deposition that the affidavit was in error, that she had talked to Briggs on November 26, and that they had agreed to the sale of the chair on the terms contained in Briggs' letter of confirmation to her.

If Briggs had offered a fair price for the chair, DF's owner would now be sitting on it rather than on an equally uncomfortable bench in Judge Posner's courtroom. Is there not a lesson here about greed, especially in the settling of cases?

There is remarkably little authority on the precise question

raised by this appeal—whether a sworn denial ends the case or the plaintiff may press on, and insist on discovery. In fact we have found no authority at the appellate level, state or federal. Many cases hold, it is true, that the defendant in a suit on an oral contract apparently made unenforceable by the statute of frauds cannot block discovery aimed at extracting an admission that the contract was made, simply by moving to dismiss the suit on the basis of the statute of frauds or by denying in the answer to the complaint that a contract had been made. See, e.g., *M & W Farm Service v. Callison*, 285 N.W.2d 271, 275-76 (Iowa 1979). There is also contrary authority, illustrated by *Boylan v. G.L. Morrow Co.*, 63 N.Y.2d 616, 618, 479 N.Y.S.2d 499, 500, 468 N.E.2d 681, 682 (1984). The clash of views is well discussed in *Triangle Marketing, Inc. v. Action Industries, Inc.*, 630 F.Supp. 1578, 1581-83 (N.D.Ill.1986), which, in default of any guidance from Illinois courts, adopted the *Boylan* position. We need not take sides on the conflict.

The fact that this is obviously such a difficult question reveals a lot about the conflicting currents in which the Statute of Frauds is to be interpreted. Upon a first glance at the relevant Code section (§ 2-201(3)(b)), it seems that the Statute is only overcome if the party who asserts the defense of a lack of a writing has already admitted the existence of the contract on the writing. If the purpose of the Statute is to protect a party who has not yet signed a writing—in circumstances in which it is reasonable to expect that a writing would be signed if there were really a contract—then there is no reason to subject a party who has not signed to a deposition (and the temptation to lie). For, even if the parties had reached an oral agreement, that should not make the contract enforceable absent the protection of the writing. If, on the other hand, we only protect parties who in fact never entered into an oral agreement, then we do not have a formality at all, but rather a swearing contest. Once again, the question is whether the dominant purpose of the statute is to protect one party's right to reflect or if it is to prevent a fraudulent assertion of the existence of an oral agreement.

When there is a bare motion to dismiss, or an answer, with no evidentiary materials, the possibility remains a live one that, if asked under oath whether a contract had been made, the defendant would admit it had been. The only way to test the proposition is for the plaintiff to take the defendant's deposition, or, if there is no discovery, to call the defendant as an adverse witness at trial. But where as in this case the defendant swears in an affidavit that there

was no contract, we see no point in keeping the lawsuit alive. Of course the defendant *may* blurt out an admission in a deposition, but this is hardly likely, especially since by doing so he may be admitting to having perjured himself in his affidavit. Stranger things have happened, but remote possibilities do not warrant subjecting the parties and the judiciary to proceedings almost certain to be futile.

A plaintiff cannot withstand summary judgment by arguing that although in pretrial discovery he has gathered no evidence of the defendant's liability, his luck may improve at trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496 (7th Cir.1986); *Spellman v. Commissioner*, 845 F.2d 148, 151 (7th Cir.1988). The statement in a leading commercial law text that a defense based on the statute of frauds must always be determined at trial because the defendant might in cross-examination admit the making of the contract, see White & Summers, *Handbook of the Law Under the Uniform Commercial Code* 67 (1980), reflects a misunderstanding of the role of summary judgment; for the statement implies, contrary to modern practice, that a party unable to generate a genuine issue of fact at the summary judgment stage, because he has no evidence with which to contest an affidavit of his adversary, see Fed.R.Civ.P. 56(e), may nevertheless obtain a trial of the issue. He may not. By the same token, a plaintiff in a suit on a contract within the statute of frauds should not be allowed to resist a motion to dismiss, backed by an affidavit that the defendant denies the contract was made, by arguing that his luck may improve in discovery. Just as summary judgment proceedings differ from trials, so the conditions of a deposition differ from the conditions in which an affidavit is prepared; affidavits in litigation are prepared by lawyers, and merely signed by affiants. Yet to allow an affiant to be deposed by opposing counsel would be to invite the unedifying form of discovery in which the examining lawyer tries to put words in the witness's mouth and construe them as admissions.

The history of the judicial-admission exception to the statute of frauds, well told in Stevens, *Ethics and the Statute of Frauds*, 37 Cornell L.Q. 355 (1952), reinforces our conclusion. The exception began with common-sense recognition that if the defendant admitted in a pleading that he had made a contract with the plaintiff, the purpose of the statute of frauds—protection against fraudulent or otherwise false contractual claims—was fulfilled. (The situation

would be quite otherwise, of course, with an oral admission, for a plaintiff willing to testify falsely to the existence of a contract would be equally willing to testify falsely to the defendant's having admitted the existence of the contract.) Toward the end of the eighteenth century the courts began to reject the exception, fearing that it was an invitation to the defendant to perjure himself. Later the pendulum swung again, and the exception is now firmly established. The concern with perjury that caused the courts in the middle period to reject the exception supports the position taken by Mrs. Brown in this case. She has sworn under oath that she did not agree to sell the Willits Chair to DF. DF wants an opportunity to depose her in the hope that she can be induced to change her testimony. But if she changes her testimony this will be virtually an admission that she perjured herself in her affidavit (for it is hardly likely that her denial was based simply on a faulty recollection). She is not likely to do this. What is possible is that her testimony will be sufficiently ambiguous to enable DF to argue that there should be still further factual investigation—perhaps a full-fledged trial at which Mrs. Brown will be questioned again about the existence of the contract.

With such possibilities for protraction, the statute of frauds becomes a defense of meager value. And yet it seems to us as it did to the framers of the Uniform Commercial Code that the statute of frauds serves an important purpose in a system such as ours that does not require that all contracts be in writing in order to be enforceable and that allows juries of lay persons to decide commercial cases. The methods of judicial factfinding do not distinguish unerringly between true and false testimony, and are in any event very expensive. People deserve some protection against the risks and costs of being hauled into court and accused of owing money on the basis of an unacknowledged promise. And being deposed is scarcely less unpleasant than being cross-examined—indeed, often it is more unpleasant, because the examining lawyer is not inhibited by the presence of a judge or jury who might resent hectoring tactics. The transcripts of depositions are often very ugly documents.

Some courts still allow the judicial-admission exception to be defeated by the defendant's simple denial, in a pleading, that there was a contract; this is the position well articulated in Judge Shadur's opinion in the *Triangle Marketing* case. To make the defendant repeat the denial under oath is already to erode the exception (as well as to create the invitation to perjury that so concerned the courts that

rejected the judicial-admission exception altogether), for there is always the possibility, though a very small one, that the defendant might be charged with perjury. But, in any event, once the defendant has denied the contract under oath, the safety valve of section 2-201(3)(b) is closed. The chance that at a deposition the defendant might be badgered into withdrawing his denial is too remote to justify prolonging an effort to enforce an oral contract in the teeth of the statute of frauds. If Dorothy Brown did agree on November 27 to sell the chair to DF at a bargain price, it behooved Briggs to get Brown's signature on the dotted line, posthaste.

AFFIRMED.

FLAUM, Circuit Judge, dissenting.

Because I disagree with the majority's holding that additional discovery is prohibited whenever a defendant raises a statute of frauds defense and submits a sworn denial that he or she formed an oral contract with the plaintiff, I respectfully dissent. Neither would I hold, however, that a plaintiff is automatically entitled to additional discovery in the face of a defendant's sworn denial that an agreement was reached. Rather, in my view district courts should have the authority to exercise their discretion to determine the limits of permissible discovery in these cases. This flexibility is particularly important where, as here, the defendant's affidavit does not contain a conclusive denial of contract formation. While district courts have broad discretion in discovery matters, I believe the district court abused that discretion in the present case.

I.

The purpose of the statute of frauds "is to protect a party from the fraudulent and perjurious claim of another that an oral contract was made and not to prevent an oral contract admittedly made from enforcement." *URSA Farmers Coop. Co. v. Trent*, 58 Ill.App.3d 930, 16 Ill.Dec. 348, 350, 374 N.E.2d 1123, 1125 (1978) (citing *Cohn v. Fisher*, 118 N.J.Super. 286, 287 A.2d 222 (1972)).

Note how the ascription of a purpose to a statute determines its scope and application. Judge Flaum asserts that the purpose of the Statute is solely to prevent fraudulent claims of contract. If such is the purpose of the Statute, then of course oral agreements that conclusively can be shown to exist should be enforced. If, however, the Statute has the additional purpose of requiring a

writing in those transactional situations in which reasonable parties would not feel comfortable saying there is a deal until the writing is executed, then even a proven oral agreement should not be enforceable.

The purpose determines the construction of the statute. From this understanding there is only one step to Llewellyn's insight that a good argument can be made on each side of every case, for it is relatively easy to formulate the purpose of a statute in both narrow and more broad-ranging terms. Remember this as you prepare for your exam—and as you write legal arguments for the rest of your career. A corollary is that a Code provision never interprets itself. Before a provision can be applied, it must be constructed, and before it can be constructed, its purpose must be determined—or more precisely, one ascribed to it.

The statute is also designed to protect innocent parties from the expense of defending against allegations that they breached a contract that is not evidenced by a writing.

Yet Judge Flaum seems to draw no consequences from this second purpose of the rule. Why?

As the majority notes, there is no Illinois case law conclusively deciding a plaintiff's right to obtain further discovery when a defendant denies the existence of an oral contract in a sworn affidavit. Relevant case law in other jurisdictions is split between the position that the majority adopts today and a rule permitting additional discovery (and in some cases full trials) in statute of frauds cases. . . .

A.

Although it is difficult to give full effect to both the statute of frauds and the admissions exception thereto, that is what we must attempt to do. In my view, these provisions can best be reconciled by allowing district courts to exercise their discretion to determine when additional discovery is likely to be fruitful and when it is being sought just to improperly pursue a defendant who is clearly entitled to the protection of the statute of frauds.

If a denial is a complete bar to additional discovery, the exception to the statute of frauds for admissions made in a "pleading, testimony or otherwise in court that a contract for sale was made" would be rendered virtually meaningless. Ill.Rev.Stat. ch. 26, para. 2-201(3)(b) (emphasis added). In Illinois involuntary admissions can

satisfy the admissions exception to the statute of frauds. *See URSA Farmers*, 58 Ill.App.3d 930, 16 Ill.Dec. 348, 374 N.E.2d 1123. Such involuntary admissions will be almost impossible under the majority's rule because the plaintiff will never have an opportunity to examine the defendant in order to elicit an involuntary admission. Either the defendant will make a fatal admission in his or her affidavit and the statute of frauds exception will be satisfied without resort to the testimony component, or the defendant will deny the contract in his or her pleadings and the case will be dismissed before a testimonial admission is possible. A blanket rule prohibiting any further discovery once the defendant denies under oath that a contract was formed is therefore too inflexible.

In general this is a good interpretive strategy—every provision of the Code should have some field of operation. If the suggested interpretation of one provision essentially writes another provision out of the book, then that interpretation is probably incorrect. However, the goal is not to provide the maximum domain for every rule. Some rules are designed to govern few cases. There would be nothing wrong with an interpretation of this Code section that permitted only voluntary admissions to defeat the Statute of Frauds.

Similarly, I would not adopt a rule that requires district courts to allow additional discovery in every one of these cases. I would leave the decision to the discretion of the district judge. In cases where a defendant does not explicitly deny under oath that an oral contract was reached, or where there is some indication that the statute of frauds is being used to perpetrate a fraud, it would be permissible to allow the plaintiff to question the defendant under oath to ensure that he or she personally denies that the parties formed an oral contract. This does not mean, however, that summary judgment is never appropriate when the statute of frauds is raised as an affirmative defense. If a defendant who conditionally denies contract formation in his or her pleadings or affidavit specifically denies that an agreement was reached in a deposition, summary judgment might well be appropriate at that stage of the litigation. A simple denial in an affidavit, however, should not trigger foreclosure of further discovery in every case.

B.

In the present case I think the district court abused its discretion

by disallowing any additional discovery once Brown filed her motion to dismiss and accompanying affidavit. The majority argues that it would be futile for DF Activities Corporation ("DF") to take Brown's deposition. Brown is unlikely to admit any facts from which a reasonable trier of fact could conclude that an oral contract was formed because, in the face of her affidavit, such admissions would leave her exposed to perjury charges. In my view, this overstates the content of Brown's affidavit. While Brown denied that any oral or written agreement was reached in both her answer and motion to dismiss, such a blanket denial is curiously missing from her affidavit. Rather, in her affidavit Brown stated only that she did not accept any offer from Domino's Farms or Sarah Briggs for the sale of the Willits chair and that she does not recall having a conversation with Sarah Briggs on November 26, 1988. Deposing Brown therefore would not necessarily be a futile effort. It is possible that under questioning during a deposition Brown would remember the November 26 conversation during which Briggs claims she and Brown reached an agreement for the sale of the chair. Although any convenient prior memory lapse might be viewed with suspicion if a deposition elicited additional information, it is highly unlikely that it would lead to perjury charges. On the facts of this case, I believe the district court abused its discretion when it refused to allow DF to take Brown's deposition.

II.

I share the majority's concern that one of the purposes of the statute of frauds is to protect litigants from the cost of defending breach of contract claims based on alleged agreements that are not supported by written documentation. The statute of frauds, however, contains a specific exception for cases in which a party admits in a pleading, testimony, or otherwise in court that an oral contract was reached, and that provision must be given some effect. The testimonial admissions provision would be virtually meaningless if a district court could never exercise its discretion to permit additional discovery in the face of a defendant's sworn denial in an affidavit.

Because in my view the district court abused its discretion when it prohibited further discovery, I would remand this case to the district court with instructions to permit discovery to continue at least to the point where DF is given an opportunity to depose Brown. If Brown then denies under oath during her deposition that any oral

contract was made, summary judgment might well be appropriate at that time.

